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CITATIONS

Statute:	
Emergency Price Control Act of 1942, as amended (50 U. S. C. App. (Supp. V) 901 *et seq.*):	
Sec. 1	7, 10
Sec. 2	10
Regulations:	
Price Schedule No. 28, 6 F. R. 4761	2
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758700—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 250

PUBLICKER INDUSTRIES, INC., PETITIONER

v.

EARL W. CLARK, DIRECTOR OF THE DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 569–575, 580) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on May 31, 1947 (R. 576). By order of the court dated June 6, 1947, Earl W. Clark, Director of the Division of Liquidation, Department of Commerce, was substituted as respondent for Philip B. Fleming, Temporary Controls Administrator, who had suc-

ceeded to the powers and duties of the Price Administrator (R. 577). On July 10, 1947, the court entered an order amending its opinion and denying the petitioner's motion for reversal of judgment or for rehearing (R. 580). The petition for a writ of certiorari was filed on August 8, 1947. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. (Supp. V) 924 (d)), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether Maximum Price Regulation No. 28, under which the prices of industrial alcohols sold to the United States were determined by adding to each plant's actual unit costs fixed margins in accordance with a sliding scale, varying with volume, was invalid as to the petitioner.

STATUTE AND REGULATION INVOLVED

The statutory provisions involved are contained in Sections 1 and 2 of the Emergency Price Control Act of 1942, as amended (Appendix A., *infra*, pp. 10–11). The pertinent provisions of Maximum Price Regulation No. 28, as amended (9 F. R. 13209), are set forth in Appendix B., *infra*, pp. 12–13.

STATEMENT

Ethyl alcohol was first brought under price control by Price Schedule No. 28 (issued Sep-

tember 15, 1941, 6 F. R. 4761), which fixed specific dollar-and-cents prices for all sellers. On February 17, 1942, this regulation was re-issued by the Price Administrator under the authority of the Emergency Price Control Act of 1942, as amended, with the title Revised Price Schedule No. 28 (7 F. R. 1257). By Amendment 2 to Revised Price Schedule No. 28 (issued September 17, 1942, 7 F. R. 7401), distilleries which had been converted from the production of alcoholic beverages to the production of industrial alcohol for war purposes and were selling ethyl alcohol to the United States Government were given the option of making such sales at the fixed dollar-and-cents prices, or at prices determined by a cost-plus formula. Revised Price Schedule No. 28 was subsequently superseded by Maximum Price Regulation No. 28 (issued February 22, 1943 (8 F. R. 2339)), which thereafter governed prices of all sales of ethyl alcohol, excluding ethyl alcohol produced on the West Coast. By Amendment 3 to Maximum Price Reguation No. 28 (issued June 28, 1943, 8 F. R. 9016), the cost-plus formula was made available to all producers of ethyl alcohol from grain, including producers like the petitioner, whose regular business was the production of ethyl alcohol.

For each plant the formula provided for a price, to be determined quarterly, equal to the sum of the following: (1) certain specified costs; (2) a fixed allowance of 3¢ per gallon to cover

general and administrative expenses; and (3) a profit allowance of 4¢ per gallon for the first 750,000 gallons, 3¢ per gallon for the next 750,000 gallons and 2¢ per gallon (increased to 2½¢ by Amendment 4) for production in excess of 1,500,000 gallons.[1] Amendment 10 to Maximum Price Regulation No. 28 (issued November 6, 1944, 9 F. R. 13209), changed the 3¢ per gallon fixed allowance for general and administrative expenses to an allowance measured by actual general and administrative expenses in no event to exceed 3¢ per gallon.[2]

The petitioner filed a protest (R. 1–13) against Amendement 10, which was duly considered on all the evidence adduced and, after oral argument before a Board of Review and the receipt of their report, was denied by the Price Administrator on July 2, 1945 (R. 338–369). Thereafter, the petitioner filed a complaint in the United States Emergency Court of Appeals (R. 531–549). The proceeding was subsequently remanded to the Price Administrator for the receipt of additional evidence (R. 374). The protest was denied on reconsideration by the Price Administrator on July 22, 1946 (R. 513–528), and this denial was sus-

[1] The formula also provided for the deduction from production costs of the value of certain by-products.

[2] The statutory statements of considerations accompanying Amendments 3 and 10, which detail the economic and other justifications for such amendments, are set forth in the Record, at pp. 310–315 and 329, respectively.

tained by the court below (R. 513–515, 516–528, 569–575).

ARGUMENT

The petitioner is the firm most seriously affected by the administrative action complained of (Pet. 5–6), and the gravamen of its petition is not that its profits under the regulation were inadequate by any absolute yardstick or even by any relative yardstick, such as its own pre-war experience or its competitors' current experience, but (1) that its sales to the government were less profitable under the regulation as amended by Amendment 10 than they had been under the regulation as amended by Amendment 3, and (2) that the change effected by Amendment 10 bore more heavily upon it than upon other producers. The petition thus presents neither a substantial constitutional question nor a significant question of administrative law requiring this Court to take jurisdiction, and, for that reason alone, it should be denied.

Moreover, the decision of the United States Emergency Court of Appeals was eminently correct. The petition stresses at great length the impropriety of the view of the court below as to the Price Administrator's statutory authority to regulate profits. It apparently urges as error that the court below construed the statute as authorizing control of profits of alcohol producers merely for the purpose of restricting their net

profits to a pre-conceived figure. But the court did not hold "that the Administrator had statutory authority to control the profits, as such, of petitioner," and thus in this respect the petition is grounded upon a fundamental misconstruction of the opinion below (Pet. 7). The court simply declared that "any cost-plus pricing technique necessarily involves the fixing of profits as an element" (R. 575). The petitioner does not complain of the adoption by the Administrator of a cost-plus pricing technique, since risk of any loss on petitioner's sales was thereby eliminated. Nor did the court below hold that the Administrator was in fact determining "each grain alcohol producer's profit," or that the regulation was based "solely on an attempt to achieve a uniform rate of return to the group of industrial alcohol producers owning their own plants" (Pet. 7). There is nothing in either the court's opinion or the record to support the petitioner's conclusion that the Administrator established any predetermined (albeit unspecified) rate of return on investment for all producers; except to the extent that profits are *ipso facto* limited by price control, petitioner's profits were limited only by the capacity of its plants and its own efficiency.

The court below analyzed the two administrative actions which the petitioner has held out in contradistinction to each other, Amendments 3 and 10 to Maximum Price Regulation No. 28. It

found, in effect, that the Administrator had first adopted as a major purpose the encouragement of increased production and had, consequently, utilized a formula which provided prices *higher* than those he would otherwise have established under the normal statutory standards of general fairness and equity. However, when the industry "had achieved almost peak production" (R. 572), the special incentive[3] was eliminated to accomplish other purposes of the Act, "* * * to prevent abnormal increases in prices, to eliminate and prevent profiteering, and to assure that defense appropriations were not dissipated by excessive prices." Section 1 (a) of the Act, cited by the court below (R. 572).

The petitioner was the chief loser by the elimination of the special incentive in the form of the flat 3¢ per gallon allowance for administrative expense because it had been the chief beneficiary of its adoption. The court below, in reviewing the continuing validity of the regulation as amended by Amendment 10, as against peti-

[3] The fixed allowance of 3¢ per gallon for general and administrative expenses was intended to stimulate maximum output, particularly of high volume producers, since expenses would decrease as volume increased; and the producer's profit would be swelled by the difference between the 3¢ per gallon administrative expense allowance and actual administrative expense incurred. Statement of considerations involved in the issuance of Amendment 3 to MPR 28 (R. 310–315).

tioner's complaint that it was unlawfully discriminatory, applied return on investment as a test and found no unlawful discrimination (R. 572–575).[4] While the petitioner quarrels with the the application of return on investment as a test, it suggests no alternative test, arguing, in effect, that the regulation *a priori* is invalid because it results in different average unit margins of profit. But clearly the petitioner has not sustained its burden of proving the Administrator's method of classification to be arbitrary or unreasonable.[5]

CONCLUSION

The decision below is correct, and there is no warrant for review of the questions presented by

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[4] As the petitioner points out (Pet. 7, 14–15), the pricing formula was uniformly applied whether or not the producer's plant was wholly or partly owned by the Government. The petitioner does not complain of discrimination on this score, having been the beneficiary of the largest government investment, dollarwise, in alcohol plants. The extent of government investment in alcohol plants is summarized in a report to the Senate by the Secretary of Agriculture, Senate Document No. 167, 79th Cong., 2d sess.

[5] The petitioner does argue that the burden of proof placed upon it is "insuperable" (Pet. 8). The implication of the petitioner's argument appears to be that a regulation must be held invalid whenever a party attacking it finds proof of its invalidity to be beyond his power. However, in support of its argument, the petitioner points out only that the court below found the record inadequate to support the conclusions urged upon it by the petitioner and that the available published data was insufficient for the same purpose (Pet. 17).

the petition. The petition should therefore be denied.

Respectfully submitted.

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AUGUST 1947.

APPENDIX A

Pertinent Statutory Provisions

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED, 56 STAT. 23, 58 STAT. 632

Section 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; * * *

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, * * *; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section

201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *

* * * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. * * *

APPENDIX B

Pertinent Regulatory Provisions

MPR 28—ETHYL ALCOHOL (EXCLUDING WEST COAST ETHYL ALCOHOL)

(As Amended by Amendment 10)

§ 1412.263 (h) *Sales of certain ethyl alcohol to the Defense Supplies Corporation.* (1) The maximum price for the sale by any plant to the Defense Supplies Corporation of ethyl alcohol of 190 proof distilled from grain shall be the maximum price set forth in paragraphs (a) to (d) of this section, or a maximum price computed pursuant to the formula below. * * *

Maximum price per gallon of 190 proof ethyl alcohol f. o. b. works shall be the sum of the following cost items per gallon, less the recovered value of dried feed, fusel oil and the like, plus a margin for profit computed pursuant to subparagraph (2):

(i) Direct materials.

(ii) Direct labor.

(iii) Miscellaneous direct production charges.

(iv) Indirect production expenses.

(v) Miscellaneous direct expenses.

(vi) General and administrative expense, not in excess of $.03 per gallon.*

* * * * *

(2) The per gallon margin of profit shall be allowed on the alcohol produced in each plant as follows: For each gallon produced and sold to the Defense Supplies Corporation during a calendar quarterly period, up to and including 750,000 gallons, 4 cents per gallon; for each gallon produced and sold during a calendar quarterly period over 750,000 gallons and up to and including 1,500,000 gallons, 3 cents per gallon; and for each gallon produced and sold during a calendar quarterly period over 1,500,000 gallons, 2½ cents per gallon.

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* Between July 1, 1943, the effective date of Amendment 3, and November 11, 1944, the effective date of Amendment 10, this provision read as follows:

"(vi) An allowance of $.03 per gallon for selling and general and administrative expenses."

U. S. GOVERNMENT PRINTING OFFICE: 1947